

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 10 of 2018

BETWEEN:

KEVIN TOWNSEND

Employee

And

NONSUCH MANAGEMENT LTD.

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. St. Lawrence DeFreitas

Member

Appearances:

Mr. Samuel James of Antigua & Barbuda Free Trade Union, Representative for the Employee

Mr. Cameron Fraser and Mr. Anderson Carty, Managing Director and Consultant of and for the Employer

2020: November 23
November 27

JUDGMENT

Brown, P:

Background

1. These proceedings were commenced by Reference of Complaint filed on February 21, 2018. The main issue in dispute between the parties is whether the Employee was unfairly dismissed by reason of the termination of his services after a physical confrontation with one of his co-workers without a full investigation or a disciplinary hearing.
2. The Employer is a registered company, carrying on business as a hotelier on its premises at Nonsuch Bay, St. Philip, Antigua. Its Managing Director is Mr.

Cameron Fraser and its Restaurant Team Leader is Ms. Schena Drew who also functions as Duty Manager from time to time. Each of them issued a witness statement and testified on behalf of the Employer.

3. The Employee commenced his employment as a Line Cook on October 10, 2010 and was dismissed on May 19, 2016. His daily rate of pay was \$90.00. Ms. Akelia Benjamin was also employed by the Employer in its restaurant. Prior to May 18, 2016 the Employee and Ms. Benjamin enjoyed a "friendly relationship".
4. According to the Employee, on May 18, 2016 Ms. Benjamin was standing and bending over in a doorway when he passed through it with a glass of water without being aware that he touched her. After he passed Ms. Benjamin, she struck him in his back and he retaliated by throwing the glass of water "on her". She responded by striking him in his back a second time, after which he threw a second glass of water on her.
5. As a result of a telephone call made to the Freetown Police Station, police officers visited the premises and cautioned both the Employee and Ms. Benjamin about their conduct but no further police investigation ensued and no charge was brought against either of them.
6. According to Ms. Drew, who was not then on the premises, Ms. Benjamin also reported the matter to her by telephone, complaining that the Employee jammed her in her side. Ms. Drew then called the Employee by telephone and he recounted a similar story. Ms. Drew concluded that there was no inconsistency between the two versions of what transpired and determined that there was no need for any further investigation. She took no written statement from either the Employee or Ms. Benjamin.
7. On May 19, 2016 Ms. Drew orally reported the incident to Mr. Fraser. She did not provide him with a written report on the incident. However, based on her oral report, Mr. Fraser also concluded that there was no need for any further investigation. Like Ms. Drew, he requested no written statement from either the Employee or Ms. Benjamin.
8. By letter dated May 6, 2016, upon his arrival at work, the Employee was dismissed with immediate effect on the ground that his actions, involving a physical assault against Ms. Benjamin, were "unacceptable". In dismissing the Employee, the Employer also took into consideration its earlier written warning to him in respect of an incident when he retaliated "with violence" and thereby committed a "serious breach of conduct".

The Opposing Cases

9. By his Memorandum of Claim the Employee contended that he was unfairly dismissed on the following grounds:
 - (a) There was no proper investigation;
 - (b) He was never given an opportunity to explain what happened;
 - (c) He was never invited to any disciplinary proceeding;
 - (d) He was never informed that his employment was in jeopardy; and
 - (e) He was denied due process and natural justice.
10. In its Memorandum of Defence the Employer contended that it acted properly and reasonably and disputed the claim on the following grounds:
 - (a) Upon receipt of the complaint from Ms. Benjamin, Ms. Drew conducted an inquiry via telephone whereby the Employee gave a full account of his version of the altercation;
 - (b) The Employee did not deny the reality of the complaint made by Ms. Benjamin, except for his assertion that he was unaware that he touched her;
 - (c) The Employee's action of jamming Ms. Benjamin was deliberate and intended to provoke her;
 - (d) Ms. Benjamin was not the aggressor and did not start the fight;
 - (e) The Employee admitted to "gross misconduct in that he physically assaulted Ms. Benjamin by knowingly touching her on the butt".

The Trial

11. Since the Employer dismissed the Employee, the trial proceeded on the fundamental basis that the burden was on the Employer to prove that the dismissal was not unfair. Unless and until it discharged that evidentiary burden, the dismissal would be held to be unfair.
12. At the trial, the Employer relied on the evidence of Mr. Fraser and Ms. Drew. Ms. Benjamin did not provide a witness statement and was not called as a witness to testify. Accordingly, the only direct evidence as to what transpired during the altercation came from the Employee. That weakness in the Employer's case was compounded by the absence of a written statement from either the Employee or Ms. Benjamin. Moreover, the Employer's case also suffered from the lack of a written report from Ms. Drew or any contemporaneous notes made by her during her respective telephone conversations with Ms. Benjamin and the Employee. As a result, the Employer's evidence as to what transpired is tenuous at best.

13. The tenuousness of the Employer's evidence is underscored by the following:
 - (a) Notwithstanding the similarities in the oral accounts of the incident given by the Employee and Ms. Benjamin, Ms. Drew acknowledged that the Employee maintained that he was unaware that he had "jammed her in her side or even touched her"; and
 - (b) Mr. Fraser's conclusions that the Employee had "jammed Ms. Benjamin in her side"; that she "retaliated by pushing him"; that he "threw a glass of red wine in her face"; and that Ms. Benjamin "pushed" the Employee a second time.

Those assertions of Mr. Fraser differ significantly from those made in the dismissal letter which he issued. Rather than using the word "jammed", he used the phrase "pushed or touched". In addition, in the dismissal letter, instead of referring to "red wine", he mentioned only water as the liquid which the Employee threw onto Ms. Benjamin.

14. On the other hand, in her witness statement, Ms. Drew stated that Ms. Benjamin told her that while she was counting linen, the Employee jammed her in her side and she "pushed him". She continued that on the first occasion the Employee had "a glass of red wine in his hand which he threw in her face" and that Ms. Benjamin "pushed him again". Further, Ms. Drew stated that there was a "push off between the two of them".
15. There is no doubt that there are clear differences in the statements compared with what is stated in the dismissal letter and between what is alleged by Mr. Fraser and what is alleged by Ms. Drew. All of the allegations are different in some respects to the Employee's written and oral evidence. In the circumstances, where those differences occur, we are inclined to prefer the version of the Employee.
16. It is also noteworthy that, under cross examination, Mr. Fraser admitted that the Employee was totally unaware of what Ms. Drew had reported orally to him. Moreover, he admitted that he did not request a written statement from either Ms. Benjamin or the Employee.
17. Further, under cross examination Mr. Fraser testified that he spoke to the Employee's co-workers who heard the altercation and that although the information he gathered from them also influenced his decision to dismiss the Employee, he did not communicate that information to the Employee.

18. In addition, Mr. Fraser testified that on the morning of May 19, 2016, having not seen him between that time and when the altercation occurred, he met the Employee at the entrance gate and delivered the dismissal letter to him. Apart from handing the letter to the Employee, Mr. Fraser testified that he did not find it necessary or important to put anything to the Employee in respect of what Ms. Drew reported to him or what his co-workers said that they heard.
19. As to Ms. Drew's testimony under cross examination she confirmed that she received no written statement from either Ms. Benjamin or the Employee; that she convened no disciplinary hearing and that, although she provided no written report to Mr. Fraser, the dismissal was based on the information she relayed to him.
20. Ms. Drew also acknowledged the Employer's standard procedure of making or obtaining written statements and reports in similar situations but admitted that the Employer did not "follow" that procedure on the particular occasion in question. However, she maintained that during the telephone conversation, the Employee admitted to touching Ms. Benjamin.
21. Regarding the discrepancy as to whether red wine was thrown at Ms. Benjamin. Ms. Drew admitted that it was possible that Mr. Fraser may have misinterpreted some of what she told him in her verbal report.
22. As to the need for an investigative or disciplinary meeting, in response to a suggestion put to her during cross examination, Ms. Drew testified that it was a "terrible mistake" to omit having a meeting with both the Employee and Ms. Benjamin. She also agreed with the suggestion that the Employee should have been given a full opportunity to hear all the evidence gathered by the Employer about the incident.
23. In the circumstances, it is our opinion that immediately before the dismissal of the Employee there remained several unanswered questions, including the following: 1) Was it necessary or reasonable for Ms. Benjamin to stand and bend over in the doorway to count linen? 2) Was her position there deliberately designed to trigger the confrontation with the Employee? 3) Did the Employee deliberately or accidentally touch or jam Ms. Benjamin? 4) Was the Employee's contact, if any, with Ms. Benjamin in the form of a deliberate jam to her butt or a touch to her side? In answering those questions, having regard especially to the absence of any evidence from Ms. Benjamin, we are inclined to resolve any doubt in favour of the Employee.

24. Having regard to the evidence of Mr. Fraser and Ms. Drew, we ask ourselves the question: what should a reasonable employer have done in the circumstances? Alternatively stated, the question is: Whether the Employer acted reasonably in dismissing the Employee. In this regard, we are mindful of the overarching provisions of Section 58 (2) of the Labour Code. The ultimate test of whether or not a dismissal is unfair is whether, in the circumstances, the Employer acted reasonably or unreasonably.
25. In our opinion, before dismissing the Employee, the Employer should have obtained written statements from both Ms. Benjamin and the Employee, as well any of their co-workers who heard the altercation. Secondly, the Employer should have obtained a written report from Ms. Drew. Thirdly, copies of those statements and the report should have been delivered to the Employee. Finally, the Employer should have convened an investigatory or disciplinary meeting to at least attempt to better ascertain the facts and give the Employee a further opportunity to be heard.

Conclusion

26. Apart from the Employee's right to natural justice, we are mindful of our mandate under section 10 (3) of the Industrial Court Act to have particular regard for the provisions of the Labour Code and the settled principles and practices of good industrial relations. Accordingly, after careful consideration of all the evidence before us, it is our considered opinion that it was unreasonable for the Employer to dismiss the Employee in the manner it did, having the regard to all the surrounding circumstances. As a result, we find that the dismissal was unfair and that the Employee should be compensated therefor.
27. Further, based on his own testimony, we also conclude that the Employee is blameworthy. In particular, we find his evidence to be unreliable in respect of the personal relationship between himself and Ms. Benjamin prior to and at the time of the altercation. More importantly, when he demonstrated how he left the room walking past Ms. Benjamin, we were left with some doubt regarding the possibility that his body came into contact with some part of hers. Be that as it may, we are constrained to accept the Employee's testimony that he was not aware that he touched her as he passed through the doorway. In any event, his subsequent assault upon Ms. Benjamin is sufficient ground for our conclusion as to his blameworthiness.

Assessment of Compensation

28. In moving towards our assessment of compensation we refer to this Court's decision in **Michael Blackburn v LIAT (1974) Ltd Reference No. 54 of 2013**. In that case, the Court had the benefit of audio recordings of Mr. Blackburn's offensive remarks made on radio about his Employer. The recordings were made contemporaneously when he uttered the offensive words. The Court concluded that he was unfairly dismissed by virtue of the employer's failure to follow a fair disciplinary procedure. Mr. Blackburn was simply called into a meeting arranged solely for the delivery of his dismissal letter. In the end, his assessed compensation was reduced by 65% on account of his contribution. This Court's finding of unfair dismissal and the apportionment of blame were upheld by the Privy Council in Privy Council Appeal No. 0037 of 2019.
29. The Employee worked for a period of five (5) years and eight (8) months at a salary of \$450.00 per week. The documentary evidence also discloses that he earned "service charge". He testified that although he made applications to several hotels he found no new employment until January 2018. However, under cross examination he testified that in the interim he found a little work as a bartender during two carnival seasons and that he also did a little construction work from time to time.
30. Among the documents admitted on behalf of the Employer were copies of the instructions given to the Bank of Nova Scotia to effect payroll transfers in to the Employee for vacation pay, gratuity, wages and service charge up to the date of dismissal. The content of those documents were not challenged by the Employee. Moreover, his claim for the sum of \$6,120.00 as outstanding vacation was not substantiated at trial.
31. In the circumstances, we make the following awards:

(1) Loss of Protection from Unfair Dismissal:

Under this head, **we award the sum of \$6,120.00 as claimed**, being the equivalent of 1 day's pay for each month of employment.

(2) Notice Pay

We award the sum of \$450.00, being the equivalent of one week's pay in lieu of Notice.

(3) Immediate Loss

Based on his responses to questions while he was being cross examined, we find that the Employee did not make full and frank disclose of his earnings during the period of a year after his dismissal. On that basis, **we limit our award to \$7,800 under this heading**, being the equivalent of four (4) months' salary for his loss immediately after his dismissal.

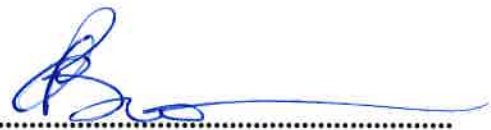
(4) Loss of Fringe Benefits

Based on Mr. Fraser's witness statement and the Employers exhibits upon the invitation of the Court, the Representatives agreed that the Employee earned service charge at an average of approximately \$100.00 per week. Accordingly, **we award the sum of \$1,733.33 under this heading**, being the equivalent of the Employee's fringe benefits for the four-month period.

We make no award for Future Loss or under any other head of compensation. As a result, **the total award of compensation is \$16,103.33.**

32. Having regard to our earlier conclusion as to the Employee blameworthiness, we apportion the percentage of his contribution to be 45%, so that his total compensation will be reduced by that percentage.
33. In the premises, we order that the Employer shall pay to the Employee the total sum of \$8,856.83 ($\$16,103.33 \times 55\%$), as compensation for his unfair dismissal, no later than December 31, 2020.

Dated this 27th day of November 2020


.....
Charlesworth O.D. Brown
President


.....
St. Lawrence DeFreitas
Member

